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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-488

JESUS AGUILERA-ENRIQUEZ,
Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, JESUS AGUILERA-ENRIQUEZ, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on May 7, 1975, petition for rehearing with suggestion for rehearing *en banc* denied on July 2, 1975.

OPINIONS BELOW

The order of the Board of Immigration Appeals, Washington, D.C. entered the 1st of February, 1974, is set forth in Appendix A.

The opinion of the Court of Appeals and the dissenting opinion of DeMascio, J., reported at 516 F. 2d 565 (6th Cir. 1975), is attached to this petition as Appendix B. The order of the Court of Appeals, on petition for rehearing with suggestion for rehearing *en banc* is attached as Appendix C.

JURISDICTION

The judgment of the Court of Appeals was entered on May 7, 1975. A timely petition for rehearing with suggestion for *en banc* consideration was denied by the lower court on July 2, 1975. This petition was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS OF LAW PRESENTED

1. Whether the denial of the "right to counsel" in a deportation proceeding, be it a constitutional or statutory "right", violates due process if the "right" depends upon whether the initial assistance of counsel could have affected the deportation outcome?

2. Whether the due process clause of the Fifth Amendment requires the government to appoint counsel for indigent resident aliens at deporta-

tion proceedings whenever the basis for deportation is other than illegal entry?

3. Whether the Court of Appeals properly applied the due process standards for appointed counsel in the deportation context as enunciated by this Court in probation revocation hearings in *Gagnon v. Scarpelli*, 411 U.S. 778 (1973)?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions involved in this case are set forth in Appendix D:

1) U.S. Constitution, Amendment V.

2) 8 U.S.C. §1252(b)(2).

3) 8 U.S.C. §1362.

STATEMENT OF THE CASE

This petition involves the application of the due process clause of the Fifth Amendment of the United States Constitution to lawful resident aliens subject to deportation proceedings under the Immigration and Nationality Act. Specifically, petitioner asserts that in deportation proceedings counsel must be appointed for indigents at government expense. It is maintained that the rights and interests of resident aliens at deportation proceedings are such that due process of law mandates the appointment of counsel since the proceedings involve an aspect of personal liberty, have consequences grave and lasting to the

alien, pit the vast resources of the federal government against the individual, and involve legal issues and questions of great complexity.

Petitioner, a forty year old native and citizen of Mexico, has resided in the United States since December 18, 1967, when he was lawfully admitted for permanent residence. He is a married farmworker, living with his wife and three daughters, citizens of the United States, in Saginaw, Michigan.

On April 12, 1972, petitioner, an indigent, was brought before the United States District Court for the Western District of Texas on charges, under 21 U.S.C. §844(a), of possession of cocaine. Participating through an interpreter, petitioner made an effort to explain the circumstances surrounding the incident giving rise to the charges, but was interrupted by the court and by his own court appointed counsel. Never clearly admitting the facts constituting the offense charged, petitioner was found guilty by the court. At no time was petitioner told, either by court or counsel, that his conviction would subsequently lead to his deportation. Nonetheless, a plea of guilty was entered. A sentence of imprisonment was suspended, and petitioner was placed on five years' probation on condition that a fine of $3,000 be paid at the rate of $50 per month.

Thereafter, petitioner returned to his residence in Saginaw, Michigan where, beginning June 1, 1972, he regularly paid each monthly installment of his fine and met other conditions of probation.

On December 7, 1972, the Immigration and Naturalization Service in Detroit served petitioner with an Order To Show Cause why he should not be deported under section 242 of the Immigration and Nationality Act, 8 U.S.C. §1252, because of his conviction for possession of cocaine. On February 6, 1973 he appeared without counsel before an Immigration Law Judge and requested appointed counsel which was summarily denied. At the time he had not yet obtained counsel to investigate the possibility of challenging the Texas conviction. On the basis of that hearing, he was ordered deported under 8 U.S.C. §1251(a)(11).

Shortly thereafter, petitioner engaged Michigan counsel. On February 12, 1973, petitioner appealed to the Board of Immigration Appeals, stating that the "validity" of the Texas conviction was being challenged.

On March 1, 1973, the entire record of the proceedings was forwarded from the Service office in Detroit to the Board of Immigration Appeals, Washington, D.C. On February 1, 1974, the Board of Immigration Appeals issued an Order dismissing the Appeal. Petitioner then appealed this decision.

On May 7, 1975, a divided panel of the Court of Appeals for the Sixth Circuit held that the due process clause of the Fifth Amendment requires appointment of counsel to indigent resident aliens in deportation proceedings under this Court's rationale set forth in *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). However, the majority opinion found against the

petitioner by predicating the "right to counsel" upon whether appointed counsel could have affected the outcome of the deportation proceeding. Judge DeMascio dissented against this latter holding. A petition for rehearing with suggestion for rehearing *en banc* was timely filed, and denied on July 2, 1975. This timely petition for writ of certiorari seeks review from the Court of Appeal's decision "qualifying" an indigent's right to appointed counsel at government expense under the due process clause of the Fifth Amendment in a deportation proceeding.

PRELIMINARY STATEMENT

Petitioner's claim is that the due process clause of the Fifth Amendment requires that in a deportation hearing an indigent resident alien must have counsel appointed at government expense in order that the proceeding meet with "fundamental fairness — the touchstone of due process." *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973). The extent to which procedural due process must be afforded an individual is dependent upon the extent to which that person may be "condemned to suffer aggrieved loss," *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring). Due process also depends upon whether the individual's interest in avoiding that loss outweighs the governmental interest in summary adjudication. Accordingly, in *Cafeteria and Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961) this Court stated that, "consideration of what procedures due process may require under any given set of circumstances must begin with a

determination of the precise nature of the government function involved as well as the private interest that has been affected by governmental action."

At stake in the present case, is the governmental interest in its administration of deportation procedures and immigration laws in general — together, perhaps, with an interest in having unencumbered proceedings, summary in nature-versus the individual's interest in protecting his or her vested right to remain in the country. Nevertheless, the government's interest as stated above must yield to the principle that an alien subjected to deportation proceedings is entitled to due process of law. *The Japanese Immigration Case*, 189 U.S. 86 (1903); *Wong Yang Sung v. McGrath*, 339 U.S. 333 (1950); *Shaughnessy v. United States ex Rel. Mezei*, 345 U.S. 206 (1953) and the cases cited therein; and *Chlomos v. Immigration and Naturalization Service*, 516 F. 2d 310 (3d Cir. 1975). Historically, the due process requirement in deportation proceedings has been predicated, at the least, on the grave and lasting consequences of deportation. Thus *Bridges v. Wixon*, 326 U.S. 136, 154 (1945) asserted that:

> Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty — at times a most serious one — cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness.

In *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) the Court noted that "deportation is a drastic measure and at times the equivalent of banishment or exile . . . [citation omitted]. It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty." Mr. Justice Jackson dissenting in *Jordan v. De George*, 341 U.S. 223, 231 (1951) compared deportation to "punishment with a life sentence of banishment." In *McLeod v. Peterson*, 283 F. 2d 180, 183 (3rd Cir. 1960), the court noted that when dealing in cases involving the status of an alien, "we are dealing with an especially critical and fundamental individual right." In citing both *Fong Haw Tan v. Phelan*, and *Jordan v. De George*, Judge Frank dissenting in *U.S. v. Parrino*, 212 F. 2d 919, 924 (2d Cir. 1954) stated that "[d]eportation, while not literally constituting criminal punishment, may have far more dire effects than . . . [a] sentence of imprisonment."

Finally, in *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) the Court characterized deportation as a ". . . loss of both property and life, or of all that makes life worth living . . ."

Ultimately, the issue is whether the governmental interest in the administration of deportation proceedings can ever outweigh an individual's right to counsel to protect his or her immigration status where such status has been termed a "critical and fundamental individual right" and where deportation has been recognized to be a "penalty," a "drastic measure," "a life sentence of banishment," and a

procedure which "may have far more dire effects" than a sentence of imprisonment. Petitioner respectfully submits that his individual interest in protecting his immigration status and the serious and complex nature of deportation procedures requires the appointment of counsel at deportation proceedings.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals has decided federal questions in a manner that conflicts with applicable decisions of this Court and other Courts of Appeals

A. The Decision of the Court of Appeals Does Not Follow the Principles Set Out by this Court in *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

The principle of the case-by-case method of appointment of counsel enunciated in *Gagnon v. Scarpelli*, 411 U.S. 778 (1973)[1] was adopted by the *Enriquez* majority as applicable to the appointment of counsel for an indigent resident alien in the deportation context. However, the majority failed to articulate standards to provide direction to immigra-

1 *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), stated that the state was not under a constitutional duty to provide counsel for indigents in all probation revocation cases, but that the decision as to the need for counsel must be made on a case-by-case basis in the exercise of a sound discretion by the state authority charged with responsibility for administering the probation system, and that certain general guidelines as to whether the assistance of counsel was constitutionally necessary should be applied in the first instance by those charged with conducting the revocation hearing.

tion judges at the initial deportation hearing as to when counsel should be appointed. This failure to articulate standards stands in stark contrast to this Court's decision in *Gagnon* where the Court proposed certain general standards as guidelines for determining the propriety of appointing counsel in probation revocation hearings. In *Gagnon* the Court directed that counsel be appointed *at least* where a timely request was based on a colorable claim either that the violation did not occur or that, if said violation did occur, justifying and mitigating circumstances existed. Moreover, if the responsible agency, in passing on the request, determined that the person brought before the agency was incapable of speaking effectively for himself, counsel should be appointed. 411 U.S. at 791-92.

In addition, an integral aspect of such guidelines requires that whenever a request for counsel is denied the reasons for the refusal be stated in the record of the proceedings. *Gagnon*, in remanding the appointment of counsel question, demanded no less:

> In every case in which a request for counsel at a preliminary or final hearing is refused, the grounds for refusal should be stated distinctly in the record. 411 U.S. at 791.

Once the standards are enunciated, the court should remand the question of the need for counsel to the original forum. Because it enunciated no standards, the Sixth Circuit failed to remand the question of the need for counsel to the Immigration Judge. Petitioner points out that even though the *Gagnon* Court was fairly convinced that the probationer, Scarpelli, had

not been denied due process, the Court *still* remanded the question of Scarpelli's need for assistance of counsel.[2] The approach suggested here by petitioner was adopted by the court in *Cleaver v. Wilcox*, 499 F. 2d 940, 945 (9th Cir. 1974),[3] when applying *Gagnon*, it held that the due process clause requires that indigent parents faced with civil proceedings to terminate their parental rights must have counsel appointed at government expense.

Accordingly, petitioner requests that this Court grant certiorari at the least to review the Sixth Circuit's failure to set forth standards that should apply to the appointment of counsel at deportation proceedings. Failure to set forth such standards places the Sixth Circuit's view of due process in direct conflict with the principles enunciated by this Court in *Gagnon v. Scarpelli, supra*.

B. The Decision Below Conflicts With The Decisions Of Other Courts Of Appeals

2. The Court's skepticism about Scarpelli's need for counsel was stated as follows:

> As to whether the state must provide counsel, respondent's admission to having committed another serious crime creates the very sort of situation in which counsel need not ordinarily be provided. 411 U.S. at 791.

3. "Parents are entitled to a judicial decision on the right to counsel in each case. The determination should be made with the understanding that due process requires the state to appoint counsel whenever an indigent parent, unable to present his or her case properly, faces a substantial possibility of the loss of custody or of prolonged separation from a child." (footnote omitted), *Id.* at 945.

Regarding The Right To Counsel In Deportation Proceedings.

1. An indigent's "right" to appointed counsel.

It is uncontroverted that an alien subject to deportation proceedings is entitled to due process of law. *The Japanese Immigration Case, supra; Shaughnessy v. U.S. ex rel. Mezei, supra;* and *Wong Yang Sung v. McGrath, supra.* However, on the basis of conflicting decisions of Courts of Appeals, it is now unclear whether due process in the deportation context requires the appointment of counsel to a lawful resident alien who cannot afford to hire counsel of his choice. Decisions such as *Tupacyupanqui-Marin v. Immigration and Naturalization Service,* 447 F. 2d (7th Cir. 1971); *Ah Chiu Pang v. Immigration Naturalization Service,* 368 F. 2d 637 (3rd Cir. 1966); *Murgia-Melendrez v. Immigration and Naturalization Service,* 407 F. 2d 207 (9th Cir. 1969); *Dunn-Marin v. Immigration and Naturalization Service,* 426 F. 2d 894 (9th Cir. 1970); *Martin-Mendoza v. Immigration and Naturalization,* 499 F. 2d 918 (9th Cir. 1974), *cert. denied,* 95 S. Ct. 789 (1974), and *Burquez v. Immigration and Naturalization Service,* 513 F. 2d 751 (10th Cir. 1975), all reject the argument that due process requires appointment of counsel for indigents subject to deportation. In contrast, the Sixth Circuit here, in a first impression holding adopts a "qualified" right to counsel:

> The Supreme Court holdings in Gagnon, Morrissey v. Brewer, 408 U.S. 471 (1972), and In re Gault, 387, have undermined the position that

> counsel must be provided to indigents only in criminal proceedings. Decisions such as Tupacyupanqui-Marin v. Immigration and Naturalization Service, 407 F. 2d 207 (9th Cir. 1969), which contain dictum appearing to set forth a per se rule against providing counsel to indigent aliens facing deportation, rested largely on the outmoded distinction between criminal cases (where the Sixth Amendment guarantees indigents appointed counsel) and civil proceedings (where the Fifth Amendment applies). Where an unrepresented indigent alien would require counsel to present his position adequately to an immigration judge, *he must be provided with a lawyer at the Government's expense.* Otherwise, "fundamental fairness" would be violated. (Emphasis added.) 516 F. 2d at 568-69 n. 3

See also Judge DeMascio's dissent in *Enriquez, Id.* at 571-74.

The majority holding in *Enriquez* was recently adopted by the Fifth Circuit in *Barthold v. Immigration and Naturalization Service*, 517 F. 2d 689, 690 (5th Cir. 1975):

> It is clear that any right an alien may have in this regard is grounded in the Fifth Amendment guarantee of due process rather than the Sixth Amendment right to counsel. *Aguilera-Enriquez v. INS* (citations omitted) . . . therefore, we analyze the proceedings in terms of their fundamental fairness on a case-by-case basis.

Thus, the position of the Sixth Circuit here and that of the Fifth Circuit conflicts with applicable decisions of the Third, Seventh, Ninth and Tenth Circuits regarding appointed counsel in the deportation context.

2. The "right" predicated upon whether counsel could have affected the deportation outcome.

While the *Enriquez* Court unanimously recognized an indigent alien's right under the due process clause to counsel at government expense in a deportation proceeding, the majority opinion expressly predicated the "right" upon whether the assistance of counsel could have affected the deportation outcome. 516 F. 2d at 569. This position is shared by several Court of Appeals. *Henriques v. Immigration and Naturalization Service*, 465 F. 2d 119, 120-21 (2nd Cir. 1972) *cert. denied*, 410 U.S. 968; *Villaneuva v. Immigration and Naturalization Service*, 482 F. 2d 886, 888 (5th Cir. 1973) and *Madokoro v. Del Guercio*, 160 F. 2d 164 (9th Cir. 1947); *Burquez v. Immigration and Naturalization Service, supra*. These decisions hold that the fact that an alien is without assistance of counsel at a deportation proceeding is not considered a denial of due process unless the alien can show he was prejudiced by the absence of counsel.

In contrast to the Circuit opinions above, *Chlomos v. INS*, 516 F. 2d 310 (3rd Cir. 1975), rejects the proposition that due process requires the assistance of counsel *only* when counsel can affect the outcome of the deportation proceeding. Specifically, the court stated that it had misgivings with the following holding in *Henriques v. INS, supra:*

> "Thus counsel, even if furnished, could not have obtained any other result in the administra-

> tive proceedings . . . no prejudice can be said to have resulted from the absence of counsel. This being true, the hearing below was not invalid.' [citations omitted] *Chlomos* at 314.

Careful scrutiny of the various Circuit positions, shows *Chlomos* to be consistent with the approach adopted by this Court in *Gagnon*. The due process standard adopted by this Court in *Gagnon* for appointment of counsel for indigents in probation revocation proceedings requires an examination of the viability of the charge against the probationer *as well as* examination of the probationer's ability to speak effectively for himself. *Gagnon* was not concerned with and did not promulgate the *could-counsel-affect-the-outcome* criterion created by the *Enriquez* majority and the cases relied upon. In the present case, *Gagnon* would require the appointment of counsel (the petitioner was unable to speak English) even though the Sixth Circuit found that appointed counsel could not affect the outcome of the deportation proceeding. In the deportation context, *Chlomos* comports with *Gagnon* while the decision below and others cited conflict with *Gagnon* and *Chlomos*. Moreover, the *Enriquez* majority and the conflicting decisions ignore the fact that while the grounds for deportation might be unassailable, deportation might be avoided if counsel skilled in deportation matters were available for consultation. For example, an inarticulate and unschooled resident alien could be deported as the result of a conviction which an attorney could have shown lacked the degree of finality to support the deporta-

tion.[4] Dissenting in *Enriquez*, Judge DeMascio underscores petitioner's basic disagreement with the majority's holding:

> The court today has fashioned a test to resolve whether a respondent alien's due process right requires appointment of counsel. That test is whether " . . . in a given case, the assistance of counsel would be necessary to provide 'fundamental fairness' — the touchstone of due process." Gagnon, supra. The majority concludes that lack of counsel before the immigration judge did not prevent full consideration of petitioner's sole argument and no different result would have been obtained had counsel been appointed. Accordingly, the court holds the hearing was fundamentally fair. These conclusions are reached by second guessing the record — a record made without petitioner's meaningful participation.
>
> In my view, the absence of counsel at respondent's hearing before the immigration judge inherently denied him fundamental fairness. Moreover, I do not believe that we should make the initial determination that counsel is unnecessary; or that lack of counsel did not prevent full administrative consideration of

4 Indeed, in *Mestre-Morera v. U.S. Immigration and Naturalization Service*, 462 F. 2d 1030 (1st Cir. 1972) the court held that an alien could not be deported on the basis of a narcotics conviction after receipt of a certificate that his conviction had been expunged pursuant to the Youth Correction Act 18 U.S.C. §5021. The concept of finality of conviction for purposes of deportation is complex both in concept and articulation and no doubt would require the assistance of counsel to properly articulate. Therefore, it is one not likely to be readily noticed by an immigration judge at a deportation proceeding unless fully articulated and developed in the record.

petitioner's argument, or that counsel could not have obtained a different administrative result. We should not speculate at this stage what contentions appointed counsel could have raised before the immigration judge. (Footnotes omitted.) 516 F. 2d at 573.

In view of the conflict of decisions among the several Courts of Appeals regarding the "right to counsel" in the deportation context, review by this Court is necessary to resolve the differences in a proceeding that by its very nature requires national standards. The manner in which a particular deportation proceeding is conducted regarding appointment of counsel under the Immigration and Nationality Act should not be dependent on the Circuit in which the resident alien happens to reside at the time a deportation proceeding commences.

II. Due Process Requires the Appointment of Counsel at Deportation Proceedings.

As pointed out in *The Japanese Immigrant Case*, *supra*, and cases cited in connection herewith, an alien within the United States, unlike one applying for entry at the border, is entitled to the full benefits of procedural due process under the aegis of the Fifth Amendment. Thus, basically, expulsion or deportation can be ordered only in accordance with law and after a fair hearing. Requirements of a fair hearing as applied to deportation cases have been set forth in the Immigration and Nationality Act.

In 8 U.S.C. §1252(b)(2) and 8 U.S.C. §1362 Congress noted the complexity of deportation proceed-

ings and the severe deprivation caused by either exclusion or deportation and provided that an alien has the right "of being represented (at no expense to the Government) by such counsel . . . as he shall choose." These sections unconstitutionally limit the right to counsel and deprive indigent aliens in deportation proceedings of due process for the following reasons:

1. A basic and fundamental aspect of personal liberty is at stake in a deportation proceeding, and the consequences to the deportee can be grave and lasting.

2. The right to counsel at government expense is required notwithstanding the denomination of the deportation proceeding as "civil" and "administrative" in nature.

3. At a proceeding, where an indigent alien stands accused by the Federal government possessing substantial and investigative resources, while an indigent alien has none oppresses the petitioner and inhibits the truth.

4. A deportation proceeding can be exceedingly complex and an alien, particularly one not fluent in the English language, cannot adequately understand and meet the charges.

This Court, noting that juvenile proceedings are labeled "civil," rather than "criminal," disregarded the traditional labels[5] and held with respect to an accused delinquent's right to counsel that:

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5 The "criminal — civil" dichotomy concerned Judge DeMascio in his dissent:

> [T]he Due Process Clause . . . requires that in respect to proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's *freedom is curtailed*, the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel be appointed to represent the child. (Emphasis added.) *In re Gault*, 387 U.S. 1, 141 (1967).

Gault advances the principle that the interest at stake and the effect of its loss are constitutionally relevant. Whether that interest or the proceeding to terminate that interest be denominated civil or criminal is not relevant. The penalty of deportation is as severe as an adjudication ordering a juvenile, for his own welfare, to be made a ward of the court:

> This is but an application of the general proposition that relevant constitutional re-

(Footnote 5 continued)

> A deportation proceeding so jeopardizes a resident alien's basic and fundamental right to personal liberty that I cannot agree due process is guaranteed by a "fundamental fairness" analysis on a case-by-case basis. (Citation omitted.) I think a resident alien has an unqualified right to the appointment of counsel. (Citations omitted.) When the government, with plenary power to exclude, agrees to allow an alien lawful residence, it is unconscionable for the government to unilaterally terminate that agreement without affording an indigent resident alien assistance of appointed counsel. Expulsion is such lasting punishment that meaningful due process can require no less. Assuredly, it inflicts punishment as grave as the institutionalization which may follow an In re Gault finding of delinquency. *A resident alien's right to due process should not be tempered by a classification of the deportation as "civil," "criminal," or "administrative." No matter the classification, deportation is punishment, pure and simple.* (Emphasis added.) 516 F. 2d at 572.

straints limit state power to terminate an entitlement whether the entitlement is denominated a "right" or a "privilege." *Bell v. Burson*, 402 U.S. 535, 539 (1971)

To date, this Court has held an indigent to be entitled to counsel in all proceedings where *liberty* is at stake, even if potential confinement is as short as one day. *Powell v. Alabama*, 387 U.S. 45 (1932) (States must provide appointed counsel in capital offense cases); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (States must provide appointed counsel in non-capital serious crime cases); *In re Gault, supra* (States must provide appointed counsel in juvenile proceedings that might result in institutionalization); *Argersinger v. Hamlin*, 407 U.S. 25 (1973) (Right to appointed counsel exists in all non-serious criminal cases that might result in incarceration); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (Right to appointed counsel exists in probation revocation hearings).

The right to counsel under the Due Process Clause in so-called "civil" cases rather than under the Sixth Amendment is a developing area of law which is relevant to this Court's determination of this petition.[6] In extending the right to appointed counsel at government expense in administrative probation revocation hearings, this Court held:

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6 See generally, Note, *The Indigents Right to Counsel in Civil Cases*, 76 Yale L.J. 545 (1967); Brisbois, *Trumpets in the Corridors of Bureaucracy: A Coming Right to Appointed Counsel in Administrative Adjudicate Proceedings*, 18 U.C.L.A. L. Rev. 758 (1970); Note, *The Right to Counsel in Civil Litigation*, 66 Colum. L. Rev. 1322 (1966); Comment, *Indigent Access to Civil Courts: The Tiger is at the Gates*, 26 Vand. L. Rev. 25 (1973).

> [W]e *think it is sufficient answer that we deal here not with the right of an accused to counsel in a criminal prosecution,* but with the more limited due process right of one who is a probationer or parolee only because he has been convicted of a crime. (Emphasis added.) *Gagnon v. Scarpelli, supra* at 789.

An increasing number of inferior courts recognize a constitutional mandate under the Due Process Clause to provide counsel to indigents in civil cases when the four criteria previously enumerated are present.

In *Heryford v. Parker*, 396 F. 2d 393 (10th Cir. 1968) the court extended the right to appointed counsel in mental commitment proceedings under the Due Process Clause:[7]

> It matters not whether the proceedings be labelled "civil" or "criminal" or whether the subject matter be mental instability or juvenile delinquency. It is the likelihood of involuntary incarceration — whether for punishment as an adult for a crime, rehabilitation as a juvenile for delinquency or treatment as a feebleminded or mental incompetent — which commands observance of the constitutional safeguards of due process. Where as in both proceedings for juveniles and mentally deficient persons . . . it has the inescapable duty to vouchsafe due

7 See also, *In re Fisher*, 313 N.E. 2d 851 (Ohio Sup. Ct. 1974); *Lynch v. Baxley*, 386 F. Supp. 378 (M.D. Ala. 1974) (three-judge court); *Lessor v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972); *Dixon v. Attorney General*, 325 F. Supp. 966 (M.D. Pa. 1971).

> process, and this necessarily includes the duty to see that a subject of an involuntary commitment proceedings is afforded the opportunity to the guiding hand of legal counsel at every step of the proceedings, unless effectively waived by one authorized to act in his behalf. 396 F. 2d at 396.

The *Heryford* decision is followed by a number of courts recognizing an indigent parent's right to counsel under the Due Process Clause whenever parental rights may be terminated in "civil" neglect proceedings. In *State v. Jamison*, 444 P. 2d 15 (1968) the Oregon Supreme Court describes the impact of neglect proceedings:

> The permanent termination of parental rights is one of the most drastic actions the state can take against its inhabitants. It would be unconscionable for the State forever to terminate the parental rights of the poor without allowing such parents to be assisted by counsel. Counsel in juvenile court must be made available for parents and children alike when the relationship of parent is threatened by the State. 444 P. 2d at 17.[8]

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8 *See also, In re B*, 285 N.E. 2d 288 (N.Y. 1972); *Chambers v. District Court*, 152 N.W. 2d 402 (Ia. Sup. Ct. 1967); *In re Karren*, 159 N.W. 2d 402 (Minn. Sup. Ct. 1968); *In re K*, 105 Cal. Rptr. 209 (1972); *State v. Caha*, 208 N.W. 2d 259 (Neb. Sup. Ct. 1973); *Cleaver v. Wilcox*, 499 F. 2d 940 (9th Cir. 1974); *Danforth v. State Department of Health and Welfare*, 303 A. 2d 794 (Me. Sup. Ct. 1973); and *Lemaster v. Oakley*, 203 S.E. 2d 140 (W. Va. Sup. Ct. 1974); *In re Luscier*, 524 P. 2d 906 (Wash. Sup. Ct. 1974); *In re Adoption of R.I.*, 312 A. 2d 601 (Pa. Sup. Ct. 1973). *See* generally, Note, *Child Neglect: Due Process for the Parent*, 70 Colum. L. Rev. 465 (1970); Catz & Kuelbs, *The Requirement of Appointment of Counsel for Indigent Parents in Neglect or Termination Proceedings: A Developing Area*, 13 J. of Family Law 223 (1973).

Not unlike a neglect proceeding, a deportation may result in a subsequent criminal proceeding. For example, if the Federal government proves a case for violations of 8 U.S.C. 1251(a)(13) (a ground for deportation) it has in all likelihood proven its case for a violation of 8 U.S.C. 1324 (a felony). In the former case, the penalty is deportation, and in the latter it is a fine of $2,000 or imprisonment. The impact on possible self-incrimination is not difficult to assess. At a minimum aliens require the guiding hand of skilled counsel to steer between the Scylla of a deportation finding for invoking the Fifth Amendment privilege prematurely and not responding to questions and the Charybdis of waiving the Fifth Amendment by invoking it too late and providing obviously incriminating answers. The alien's exposure to possible self-incrimination and criminal prosecution can occur because the operative acts used to determine grounds for deportation may also support a criminal charge against the alien.[9]

One court, in holding that the Due Process Clause required appointment of counsel in parental neglect proceedings was particularly concerned with the imbalance of the resources of the parties involved in the proceedings:

> [W]hether the proceeding be labelled "civil" or "criminal," it is fundamentally unfair, and a denial of due process of law for the state to seek removal of the child from an indigent parent

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9 Not unlike the criminal process, aliens are subject to arrest and incarceration during the pendency of deportation proceedings. A common practice is to require an alien to post an immigration bond to insure presence at the show cause hearing. 8 U.S.C. §§1252, 1357.

> without according that parent the right to the assistance of court appointed and compensated counsel . . . *Since the State is the adversary . . . there is a gross inherent imbalance of experience and expertise between the parties if the parents are not represented by counsel* . . . Such an interest may not be curtailed by the state without a meaningful opportunity to be heard, which in these circumstances includes the assistance of counsel. (Emphasis added.) *Cleaver v. Wilcox*, 40 U.S.L.W. 2658, 2659 (N.D. Cal. 1972), *aff'd* 499 F. 2d 940 (9th Cir. 1974).

Petitioner submits that among the clearest cases of potential injustice in the civil process are those which are brought by government against unrepresentative indigents; whether the government acts as tax collector, condemnor, landlord, as *parens patriae*, or enforcer of immigration laws. The indigent, unable because of his poverty to present the case properly, is overborne by lawyers and litigative resources paid out of the public treasury. Here petitioner is confronted with the vast and infinite resources of the U.S. Justice Department.

This gross imbalance is magnified when viewed with the fact that petitioner is unable to speak English and never completed a secondary education.[10] The Washington Supreme Court described the

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10 Several commentators have also recognized that counsel is needed for fairness in a deportation proceeding. Gordon, *Right to Counsel in Immigration Proceedings*, 45 Minn. L. Rev. 875 (1961):

> "The persons involved in immigration proceedings usually are aliens, and generally they are a less privileged economic class. Often they are at the threshold of our Country, or have recently arrived, and they have little or no comprehension of our language or institutions. The cases affecting these individuals some-

plight of the poor when faced with judicial proceedings:

> Not only do they [the poor] not know what remedies exist for wrongs done them and not only are they ignorant of the procedures for availing themselves of these remedies, but their attitude toward the courts is one of fear. *O'Connor v. Matzdorf*, 458 P. 2d 154, 160-161 (Wash. Sup. Ct. 1969).

Petitioner's arguments find further support in studies that have been undertaken to determine the impact on the outcome of a deportation proceeding and the results are compelling. The alien prevails in a far greater number of cases if he is represented by counsel.[11] In summarizing the findings of these reports Charles Gordon states:

> The commentators found that in both instances there was a vast need for greater opportunities to be represented by counsel. These studies revealed that representation by counsel had a marked effect on the administrative proceedings, and that represented aliens prevailed in a far higher proportion of cases, since their counsel were much more effective in raising points of law, in questioning due pro-

(Footnote 10 continued)

> times pose complicated factual or legal questions. Obviously the services of counsel can be quite valuable in protecting these persons' rights and status." *Id.* at 877.

See also, Haney, *Deportation and the Right to Counsel*, 11 Harv. Inter. Law Journal 177 (1970); Note, *Resident Aliens and Due Process: Anatomy of A Deportation*, 8 Villanova L. Rev. 566 (1963).

11 All these studies are discussed in Gordon, *Id.*: Wickersham Report, Report of the Ellis Island Committee and the Van Vleck Report.

> cess, in marshalling relevant evidence, and in advancing claims of United States citizenship. 45 Minn. L. Rev. *supra* at 878.

Finally the power of the United States to deport aliens is an implied power which at times must give way to express guarantees of the Fifth Amendment. *Harisiades v. Shaugnessey*, 342 U.S. 580 (1952). While 8 U.S.C. §1362 provides a right to counsel in exclusion or deportation proceedings for those who can afford to pay, it specifically prohibits representation at government expense. For indigents this provision is but a cruel hoax. Whereas the Fifth Amendment is recognized as a protection to aliens, the statutory scheme at issue limits due process so that the availability of counsel is dependent on the financial resources of the individual; this notion is unacceptable. *Williams v. Illinois*, 399 U.S. 235 (1970); *Douglas v. California*, 372 U.S. 352 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1956).

In conclusion, to deny the right to counsel to indigent aliens is to ignore the mandates of the Fifth Amendment. Justice is ill-served when the hopes of indigent aliens, with the vision of America before them, are rudely snuffed out at a deportation proceeding where they stand alone and uncounseled.[12]

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12 Whatever the merits of the constitutional arguments for provision of legal services to detained aliens, it is clear that today, effective utilization of the right to legal representation in deportation proceedings accorded under the Act, [8 U.S.C. §§1252(b)(2) and 1362] hinges not upon the freely exercised desires of the alien, as it should, but upon his financial capacity, an indiscriminate criterion which ignores the complexity of deportation proceedings and the serious ramifications of deportation. In this regard, *see also*

(Footnote 12 continued)

Kaufman v. Carter, 402 U.S. 954, 955-61 (1971) (Black and Douglas, J. J., dissenting from denial of certiorari).

At the very least, the INS should be required to maintain written lists of individuals or national or local organizations offering access to free or inexpensive legal assistance and to assure that each alien be provided with such list and an explanation of its significance immediately upon issuance of a show cause order. *See* e.g., concurring opinion of Justice Brennan, *Argersinger v. Hamlin*, 407 U.S. 25, 40-1 (1972) regarding the utilization of legal resources. *See also, Id.* at 37, n. 7.

Equally important to an analysis of an alien's right to protections afforded by meaningful legal assistance is the fact that few arguments can be made against such assistance. The economic burden of providing *counsel* would be slight, since in comparison to the great number of criminal cases where counsel must be appointed to comply with *Gideon v. Wainwright, supra* and its progeny, deportation proceedings are few, and those contested even fewer. Thus, of the total number of 788,145 apprehended aliens in fiscal year 1974, 718,740 voluntarily departed from the United States. (*1974 Annual Report: Immigration and Naturalization Service*, p. 84). Even a smaller percentage of those apprehended actually are referred to special inquiry officers for a deportation hearing. Only 45,301 cases were referred in fiscal year 1974. (*See 1974 INS Annual Report* at p. 16). Possible interference with the administrative process also is a misplaced rationale for refusing to appoint counsel. Counsel presently appear in approximately 50 percent of all deportation proceedings (estimate of Charles Gordon, INS General Counsel, cited in Haney, *supra*, at 181 n. 29), and these appearances have not noticeably disrupted INS activities. In fact, Mr. Gordon has stated that an attorney's "participation in the immigration proceeding generally is welcomed as an assurance of due process." Gordon, *Right to Counsel and Immigration Proceedings, supra*, at 878.

CONCLUSION

This petition presents important issues regarding the appointment of counsel under the Due Process Clause in the deportation context. In view of this case and the Fifth Circuit's recent adoption of the *Enriquez* rationale in *Barthold v. Immigration and Naturalization, supra*, there now exists a serious conflict of decisions among the several Circuits regarding the fundamental questions presented for review. For the above stated reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals.

Respectfully submitted,

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Counsel for Petitioner

September 29, 1975

APPENDIX A

United States Department of Justice
Board of Immigration Appeals
Washington, D.C. 20530

Feb. 1, 1974

File: A17 074 961 — Detroit

In re: JESUS AGUILERA-ENRIQUEZ

IN DEPORTATION PROCEEDINGS

ON BEHALF OF RESPONDENT: Kevin Carey, Esquire, Migrant Legal Action Program, Inc., 1820 Massachusetts Ave., N.W., Washington, D.C. 20036

ON BEHALF OF I&N SERVICE: Irving A. Appleman, Appellate Trial Attorney

ORAL ARGUMENT: May 31, 1973

CHARGES: Order: Section 241(a)(11), I&N Act, (8 U.S.C. 1251(a)(11)) — convicted of illicit possession of cocaine

APPLICATION: Termination of proceedings

This case presents an appeal from a decision of the immigration judge on February 6, 1973, finding the respondent deportable and ordering his deportation to Mexico on the charge contained in the Order to Show Cause. The appeal will be dismissed.

The respondent is a native and citizen of Mexico, age 39, who has resided in the United States since his arrival here in December 1967. He was convicted in the United States District Court, El Paso, Texas, in April 1972 for knowingly possessing a quantity of cocaine, a Schedule II controlled substance, in violation of 21 USC 844(a). The respondent received a suspended 1-year sentence and was placed on probation for a period of 5 years. He also was fined $5,000. Deportability has been established by clear, convincing and unequivocal evidence.

On appeal and at oral argument, counsel contended that the respondent's conviction was improperly obtained because he did not realize the consequences of his plea of guilty to the count of illegal possession of a quantity of cocaine. We have carefully reviewed the entire record, including the position of the Service, and conclude that counsel's contention is not meritorious. A collateral attack may be made on a criminal court judgment on the question of jurisdiction. Absent a showing that the criminal court lacked jurisdiction to render the judgment, however, we have no power to reexamine that judgment and are bound to accord it full faith and credit. See *Matter of Sirhan, et al.*, 13 I&N Dec. 592 (BIA 1970). If and when the respondent's conviction is vacated by the court, he may then move to reopen these proceedings. We should like to point out that a conviction for mere possession of a narcotic drug has been held sufficient to justify a deportation order. *Mendoza-Rivera v. Del Guercio*, 161 F. Supp. 473 (S.D. Cal. 1958), aff'd *Hoy v.*

Mendoza-Rivera, 267 F. 2d 451 (9 Cir. 1959). Accordingly, we conclude that the appeal should be dismissed.

ORDER: The appeal is dismissed.

MARVIN P. ROBERTS
Chairman

APPENDIX B

No. 74-1565
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JESUS AGUILERA-ENRIQUEZ,
Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

Petition for Review of an Order of the Immigration and Naturalization Service.

Decided and Filed May 7, 1975.

Before: Celebrezze and McCree, Circuit Judges, and DeMascio,* District Judge.

Celebrezze, Circuit Judge, delivered the opinion of the court, in which McCree, Circuit Judge, joined. DeMascio, District Judge, (pp. 10-13) filed a dissenting opinion.

Celebrezze, Circuit Judge. Petitioner, Jesus Aguilera-Enriquez, seeks reversal of a deportation order on the ground that he was constitutionally entitled to but was not afforded the assistance of counsel during his deportation hearing. He also claims that the narcotics conviction on which his

deportation order is based is not yet final and should not be available as a basis for his expulsion from the United States.

A thirty-nine-year-old native and citizen of Mexico, Petitioner has resided in the United States since December 18, 1967, when he was admitted for permanent residence. He is a married farm worker, living with his wife and three daughters in Saginaw, Michigan.

In December 1971, Petitioner traveled to Mexico for a vacation. An officer of the Saginaw, Michigan Police Department notified federal customs officers at the Mexican border that he had reason to believe that Petitioner would be returning with a quantity of heroin. When Petitioner crossed the border on his return, he was subjected to a search which produced no heroin but did reveal two grams of cocaine.

On April 12, 1972, Petitioner pleaded guilty in the United States District Court for the Western District of Texas, on one count of knowingly possessing a quantity of cocaine, a Schedule II controlled substance, in violation of 21 U.S.C. §844(a) (1970). Petitioner received a suspended one-year sentence, was placed on probation for five years, and was fined $3,000, to be paid in fifty-dollar monthly installments over the five-year probationary period. Neither Petitioner's appointed counsel nor the District Court informed him that a narcotics conviction would almost certainly lead to his deportation.

*Honorable Robert E. DeMascio, U.S. District Judge for the Eastern District of Michigan, sitting by designation.

On December 7, 1972, the Immigration and Naturalization Service issued an Order to Show Cause and Notice of Hearing, charging that because of his narcotics conviction, Petitioner should be deported under section 241(a)(11) of the Immigration and Nationality Act, 8 U.S.C. §1251(a)(11) (1970).

On February 6, 1973, Petitioner appeared before the Immigration Judge and requested appointed counsel. The Immigration Judge refused this request. After a hearing Petitioner was ordered deported and was not afforded the option of voluntary departure.

Shortly after the Immigration Judge's ruling, Petitioner engaged as counsel a Michigan legal assistance attorney, who in turn secured the services of a Texas attorney.

On February 14, 1973, Petitioner filed an appeal to the Board of Immigration Appeals, stating that the validity of the Texas conviction was being challenged.

On May 23, 1973, Petitioner's Texas counsel filed a motion to withdraw his guilty plea under Rule 32(d), F.R. Crim. P. The motion asserted that the District Court had not followed Rule 11 in accepting the plea because it had not properly determined that there was a factual basis for the plea and that the plea was made with a full understanding of the probable consequences.

On February 1, 1974, after full briefing and oral

argument by counsel for Petitioner and the Government, the Board of Immigration Appeals dismissed Petitioner's appeal. A petition for review was timely filed in this Court.

The issue Petitioner raises here is whether an indigent alien has the right to appointed counsel in a deportation proceeding. He attacks the constitutional validity of 8 U.S.C. §1252(b)(2) (1970), which gives an alien facing deportation proceedings "the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose."[1] The Immigration Judge held that this section prevented appointment of counsel at Government expense. Since he could not afford to hire a lawyer, he did not have one before the Immigration Judge.

The courts have been vigilant to ensure that aliens receive the protections Congress has given them before they may be banished from our shores. As this Circuit noted in *United States ex rel. Brancato v. Lelmann*, 239 F. 2d 663, 666 (6th Cir. 1956),

> Although it is not penal in character, deportation is a drastic measure, at times the equivalent of banishment or exile, for which reason deportation statutes should be given the narrowest of the several possible meanings.

See also Immigration and Naturalization Service v. Errico, 385 U.S. 214, 225 (1966); *Woodby v. Immigra-*

1 *See also* 8 U.S.C. §1362 (1970); 8 C.F.R. §242.16.

tion and Naturalization Service, 385 U.S. 276 (1966); *Gastelum-Quinones v. Kennedy*, 374 U.S. 469, 479 (1963). The Supreme Court has held that once an alien has been admitted to lawful residence, "not even Congress may expel him without allowing him a fair opportunity to be heard." *Kwong Hai Chew v. Colding*, 344 U.S. 590, 598 (1953). Thus, if procedures mandated by Congress do not provide an alien with procedural due process, they must yield, and the constitutional guarantee of due process must provide adequate protection during the deportation process.[2] *Yamataya v. Fisher (The Japanese Immigrant Case)*, 189 U.S. 86, 100 (1903); *Wong Yang Sung v. McGrath*, 339 U.S. 33, 49-51, *modified on rehearing*, 339 U.S. 908 (1950).

The test for whether due process requires the appointment of counsel for an indigent alien is whether, in a given case, the assistance of counsel would be necessary to provide "fundamental fairness — the touchstone of due process." *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973).[3]

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2 *See generally* Grosh, "Immigrants, Aliens, and the Constitution," 49 Notre Dame Lawyer 1075 (1974); Haney, "Deportation and the Right to Counsel," 11 Harv. Int'l. L. J. 177 (1970); Gordon, "The Right to Counsel in Immigration Proceedings," 45 Minn. L. Rev. 875 (1961).

3 The Supreme Court's holdings in *Gagnon*, *Morrissey v. Brewer*, 408 U.S. 471 (1972), and *In re Gault*, 387 U.S. 1 (1967), have undermined the position that counsel must be provided to indigents only in criminal proceedings. Decisions such as *Tupacyupanzui-Marin v. Immigration and Naturalization Service*, 447 F. 2d 603 (7th Cir. 1971), and *Murgia-Melendrez v. Immigration and Naturalization Service*, 407 F. 2d 207 (9th Cir. 1969), which contain dictum appearing to set forth a *per se* rule against providing counsel to indigent aliens facing

In Petitioner's case the absence of counsel at his hearing before the Immigration Judge did not deprive his deportation proceeding of fundamental fairness.

Petitioner was held to be deportable under section 241(a)(11) of the Immigration and Nationality Act, 8 U.S.C. §1251(a)(11), which states in relevant part:

> (a) Any alien in the United States . . . shall, upon the order of the Attorney General, be deported who — (11) . . . at any time has been convicted of a violation of . . . any law or regulation relating to the illicit possession of or traffic in narcotic drugs . . .

Before the Immigration Judge, Petitioner raised no defense to the charge that he had been convicted in April 1972 of a violation of 21 U.S.C. §844(a). Thus, he was clearly within the purview of section 241(a)(11) of the Act, and no defense for which a lawyer would have helped the argument was presented to the Immigration Judge for consideration. After the decision of the Immigration Judge, Petitioner moved to withdraw his guilty plea in the Texas District Court under Rule 32(d), F. R. Crim. P. He then urged before the Board of Immigration Appeals that this motion took him outside the reach of section

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(Footnote 3 continued)

deportation, rested largely on the outmoded distinction between criminal cases (where the Sixth Amendment guarantees indigents appointed counsel) and civil proceedings (where the Fifth Amendment applies). Where an unrepresented indigent alien would require counsel to present his position adequately to an immigration judge, he must be provided with a lawyer at the Government's expense. Otherwise, "fundamental fairness" would be violated.

241(a)(11), because the likelihood of success on that motion meant that he had not been "convicted" of a narcotics offense. He was effectively represented by counsel before the Board, and his argument was considered upon briefing and oral argument. The lack of counsel before the Immigration Judge did not prevent full administrative consideration of his argument. Counsel could have obtained no different administrative result. "Fundamental fairness," therefore, was not abridged during the administrative proceedings, and the order of deportation is not subject to constitutional attack for a lack of due process. *Henriques v. Immigration and Naturalization Service*, 465 F. 2d 119, 120-21 (2d Cir. 1972); *Villanueva-Jurado v. Immigration and Naturalization Service*, 482 F. 2d 886, 888 (5th Cir. 1973); *Sumio Madokoro v. Del Guercio*, 160 F. 2d 164 (9th Cir. 1947).

We turn, therefore, to Petitioner's second contention — that his conviction on the Texas narcotics charge has not reached the stage of finality required to support deportation under section 241(a)(11) of the Immigration and Nationality Act, 8 U.S.C. §1251 (a)(11) (1970).

That section, as excerpted above, provides for the deportation of any alien who "at any time has been convicted of . . . any law . . . relating to the illicit possession of or traffic in narcotic drugs."[4]

4 The offense to which Petitioner pleaded guilty (possession of cocaine in violation of 21 U.S.C. §844(a)) is within the ambit of section 241(a)(11). *See Hoy v. Mendoza-Rivera*, 267 F. 2d 451, 452 (9th Cir. 1959).

Petitioner argues that because he has filed a motion to withdraw his guilty plea under Rule 32(d), F. R. Crim. P., and because that motion is likely to succeed,[5] the conviction by way of judgment and sentence on April 12, 1972 does not mean that he "has been convicted" of a narcotics offense under section 241(a)(11).

The definition of "convicted" within section 241(a)(11) is a matter of federal law, to be interpreted in harmony with the policies underlying the Immigration and Nationality Act. *Gutierrez-Rubio v. Immigration and Naturalization Service*, 453 F. 2d 1243 (10th Cir. 1972); *Garcia-Gonzalez v. Immigration and Naturalization Service*, 344 F. 2d 804, 808-09 (9th Cir.), *cert. denied*, 382 U.S. 840 (1965); *Gutierrez v. Immigration and Naturalization Service*, 323 F. 2d 593, 596 (9th Cir. 1963).

The Immigration authorities must look to judicial records to determine whether a person has been "convicted" of a crime. They may not determine on their own an alien's guilt or innocence. *Rassano v. Immigration and Naturalization Service*, 377 F. 2d 971, 974 (7th Cir. 1967); *Mylius v. Uhl*, 210 F. 2d 860 (2nd Cir. 1914). Because judicial records, rather than a *de novo* review of an alien's guilt, determine whether an alien has been "convicted" of a crime, it is important that a conviction be final before it is used as the basis for a deportation order.

5 His Rule 32(d) motion asserts that the District Court failed to follow Rule 11, F. R. Crim. P., when it accepted his guilty plea because it did not inform him that deportation would result from his plea. He asserts that he was unaware of the probability of deportation when he entered his plea.

The question of when a conviction is final for deportation purposes has not been extensively litigated. The only Supreme Court guidance in the area involved an alien who had been found guilty of petty larceny in a state court, had waived his right to direct appeal, and had been placed on a one-year probation. Under Massachusetts law, at the end of his probation his sentence was revoked and his case was put "on file." This meant that the judicial determination of guilt remained but that final sentencing was held in abeyance. Instead, an ambulatory form of punishment, including surveillance of the defendant's activities, was imposed, and the District Court retained the right to impose a final sentence. In the event of formal sentencing, the defendant had the right to appeal and to obtain a trial *de novo* before a jury in Superior Court. The Supreme Court held, in a brief *per curiam* opinion, that it was "unable to say that the conviction has attained such finality as to support an order of deportation within the contemplation of §241 of the Immigration and Nationality Act." *Pino v. Landon*, 349 U.S. 901 (1955), *rev'g Pino v. Nicolls*, 215 F. 2d 237 (1st Cir. 1954).

The Seventh Circuit has interpreted *Pino* and section 241(a)(11) as requiring "that a final curtain must have been drawn in the criminal proceedings." *Will v. Immigration and Naturalization Service*, 447 F. 2d 529, 532 (7th Cir. 1971). *See also Matter of L. R.*, 8 I. & N. Dec. 269 (1959). We agree with the Seventh Circuit that not only a "conviction" but a sentence and exhaustion of procedures for direct appeal are

necessary before an alien "has been convicted" of a narcotics offense under section 241(a)(11). Within the federal judicial system, a person has not been "convicted" of a crime under section 241(a)(11) until a judgment of conviction has been entered and until procedures for a direct appeal have been exhausted or waived.[6]

Once these events have occurred, the alien "has been convicted" of an offense for deportation purposes. Post-conviction motions do not operate to negate this conclusion. If one is successful in reversing the judgment and sentence, no conviction will remain to form a basis for deportation.[7] But until a conviction is overturned, it is an adequate basis for a deportation order.

Petitioner argues that a motion to withdraw a guilty plea under Rule 32(d) is a "direct" rather than "collateral" attack on its validity, so that his conviction should not yet be considered final. We do not believe that the "direct" — "collateral" distinc-

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6 Rule 32(b), F. R. Crim. P., requires entry of a judgment, setting forth "the plea, the verdict or findings, and the adjudication and sentence." Because Rule 38 requires the stay of a sentence of imprisonment or probation and allows the stay of a sentence "to pay a fine or a fine and costs," a sentence cannot be considered final until a direct appeal has been decided or waived. Until then, "the final curtain" has not been drawn on the criminal proceeding.

7 *See Cruz-Sanchez v. Immigration and Naturalization Service*, 438 F. 2d 1087 (7th Cir. 1971); *Sawkow v. Immigration and Naturalization Service*, 314 F. 2d 34 (3d Cir. 1963); *United States ex rel. Freislinger v. Smith*, 41 F. 2d 707 (7th Cir. 1930); *Matter of Sirhan*, 13 I & N. Dec. 592 (1970); *Matter of Ibarra-Obando*, 12 I. & N. Dec. 576 (1967); *Matter of O'Sullivan*, 10 I. & N. Dec. 320 (1963).

tion is a meaningful dividing line for deportation purposes. A guilty plea waives objection to the Government's pre-trial conduct, as well as the right of direct appeal. It "draws the final curtain" on a criminal proceeding, except for the necessary step of sentencing. Before sentencing, under Rule 32(d), a motion to withdraw a guilty plea can be heard before the judgment of conviction is entered. Once sentencing is completed, however, the conviction is final for deportation purposes. A claim which is made after the entry of judgment to the effect that the guilty plea should not have been accepted is a post-conviction motion, whether it arises through a Rule 32(d) motion or a petition under 28 U.S.C. §2255 (1970).

Petitioner urges that we view his situation with particular favor because his Rule 32(d) motion is "likely to succeed." He asks, in other words, that we require the Service to conduct an inquiry into each potential deportee's criminal record to ascertain whether a post-conviction motion is likely to overturn his conviction, thereby depriving the Service of a basis for deportation.

Were we to require the Service to weigh the probability of success of each potential deportee's post-conviction pleas, we would hopelesly complicate an administrative process which Congress intended to be simple and swift.[8] We will not require

8 If a judgment of conviction is void on its face, a postconviction adjudication is not required to render it unavailable for deportation purposes. *United States ex rel. Freislinger v. Smith*, 41 F. 2d 707 (7th Cir. 1930).

the Service to double-guess the courts. A conviction is final and is a valid basis for deportation unless and until overturned by a post-conviction plea.

Petitioner's case is instructive in this regard. He claims that he had no idea that deportation might result from his guilty plea and that under *United States v. Briscoe*, 432 F. 2d 1351, 1353 (D.C. Cir. 1970), he is entitled to withdraw his plea. For the Service or for us to assess the likelihood of his claim, we would need a better understanding of the circumstances surrounding his plea, including advice given by his lawyer and his own level of sophistication, and we would have to undertake an analysis of evolving case law. *See United States v. Sambro*, 454 F. 2d 918 (D.C. Cir. 1971); *Bye v. United States*, 435 F. 2d 177 (2nd Cir. 1970); *Briscoe: United States v. Parrino*, 212 F. 2d 919 (D.C. Cir. 1954). This is an unwarranted burden to place on the Service, and we will not do so.

Our conclusion does not deprive Petitioner of all relief. He may request an administrative stay of his deportation order pending the outcome of his Rule 32(d) motion.[9] The Service has discretion to stay his deportation order, and a denial of stay is subject to review in this Court, albeit within narrow limits. *Polites v. Sahli*, 302 F. 2d 449 (6th Cir.), *cert. denied*, 371 U.S. 916 (1962). We note that it is unlikely that a stay will be granted on the grounds advanced to this Court. As we learned after oral argument, Petitioner's Rule 32(d) motion was denied on February 3, 1975 as "frivolous."

The petition for review is denied.

9 *See generally* C. Gordon & H. Rosenfield, Immigration Law and Procedure, ch. 7 (rev'd ed. 1975); *Jay v. Boyd*, 351 U.S. 345 (1950).

DeMascio, District Judge (Dissenting).

A deportation proceeding so jeopardizes a resident alien's basic and fundamental right to personal liberty that I cannot agree due process is guaranteed by a "fundamental fairness" analysis on a case-by-case basis. *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). I think a resident alien has an unqualified right to the appointment of counsel. *In re Gault*, 387 U.S. 1 (1967). When the government, with plenary power to exclude, agrees to allow an alien lawful residence, it is unconscionable for the government to unilaterally terminate that agreement without affording an indigent resident alien assistance of appointed counsel. Expulsion is such lasting punishment that meaningful due process can require no less. Assuredly, it inflicts punishment as grave as the institutionalization which may follow an *In re Gault* finding of delinquency. A resident alien's right to due process should not be tempered by a classification of the deportation proceeding as "civil," "criminal," or "administrative." No matter the classification, deportation is punishment, pure and simple.[1]

In *Gagnon*, the Supreme Court acknowledged that it was affording parolees and probationers less due process than it afforded juveniles in *In re Gault*. It reached this result because a parolee or probation-

1 Based upon a civil-criminal classification, the Seventh and Ninth Circuits have ruled that indigent aliens have no right to appointed counsel. *Tupacyupanqui-Marin v. Immigration & Nat. Service*, 447 F. 2d 603 (7th Cir. 1971); *Murgia-Melendrez v. United States Immigration & Nat. Serv.*, 407 F. 2d 207 (9th Cir. 1969).

er is in that position solely because he was previously convicted of a crime. The court reasoned that parolees and probationers should be required to demonstrate that an attorney would serve a useful purpose prior to compelling the government to provide counsel at government expense. But, in a deportation proceeding, the respondent need not necessarily be before the immigration judge because of a prior conviction.[2] The fact of conviction is only one of numerous grounds for deportation outlined in the statute. Similar to the juvenile, an alien may only stand accused of an offense.

As noted in *Gagnon*, the function of the probation or parole officer is not to "compel conformance to a strict code of behavior" but to "supervise a course of rehabilitation." 411 U.S. 784. Insertion of counsel into such a "predictive and discretionary" proceeding could inadvertently circumscribe the officer's flexibility. However, no such justification for the exclusion of counsel exists in deportation proceedings where the sole duty of the immigration law judge is to determine whether a deportable offense has occurred. 8 U.S.C. §1251(a).

Further, a probation revocation hearing is a non-

2 If the court wishes to extend *Gagnon*, perhaps a better approach is to limit the case-by-case appointment of counsel to proceedings where respondent is being deported because he has a previous conviction and is, therefore, entitled to less due process. In all other instances, counsel should be appointed as a matter of right under the due process clause. The court suggests an indigent alien is entitled to appointed counsel only when it is necessary "... to present his position adequately to an immigration judge ..." (See fn. 3, *supra*.)

adversary proceeding. The government is not represented by a prosecutor. There are no procedural rights which may be lost as in a criminal trial. A deportation hearing on the other hand is always an adversary proceeding.[3] *Gagnon* does not go so far as to hold that in adversary proceedings due process may be afforded on a case-by-case basis by retrospective determination that the hearing was characterized by "fundamental fairness."

The court today has fashioned a test to resolve whether a resident alien's due-process right requires appointment of counsel. That test is whether ". . . in a given case, the assistance of counsel would be necessary to provide 'fundamental fairness' — the touchstone of due process." *Gagnon, supra.* The majority concludes that lack of counsel before the immigration judge did not prevent full consideration of petitioner's sole argument and no different result would have been obtained had counsel been appointed. Accordingly, the court holds the hearing was

3 A reading of 8 U.S.C. §1252(b) makes it apparent that the special inquiry officer [now an immigration judge by regulation] functions as a prosecutor, defense lawyer, finder of facts, and judge. While the statute does not provide for the appointment of a government trial attorney, a regulation does. 8 CFR §242.16(c) provides that if an alien does not admit he is deportable, the immigration judge shall appoint a government trial attorney to establish the facts justifying deportation. At the hearing, the rules of evidence do not apply. Hearsay evidence is admissible. During such an adversary hearing, the indigent resident alien stands alone. He does not have a lawyer to meaningfully participate in making a record, a record upon which the Appeals Board and this court will determine whether the order of deportation was supported by evidence that is clear and convincing.

fundamentally fair.[4] These conclusions are reached by second guessing the record — a record made without petitioner's meaningful participation.

In my view, the absence of counsel at respondent's hearing before the immigration judge inherently denied him fundamental fairness. Moreover, I do not believe that we should make the initial determination that counsel is unnecessary; or that lack of counsel did not prevent full administrative consideration of petitioner's argument; or that counsel could not have obtained a different administrative result.[5] We should not speculate at this stage what contentions appointed counsel could have raised before the immigration judge. For example, a lawyer may well have contended that §1251(a)(11) is an unconstitutional deprivation of the equal protection of the laws by arguing that alienage was the sole basis for the infliction of punishment, additional to that imposed by criminal law; that since the government elected to rely upon the criminal law sanctions, it may not now additionally exile petitioner without demonstrating a compelling governmental interest.

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4 The Second Circuit has similarly held that where the respondent admits the allegations in the order to show cause and it does not appear that an attorney would affect the outcome, lack of appointed counsel does not violate due process. *Henriques v. Immigration & Naturalization Service*, 465 F. 2d 119, 121 (2nd Cir. 1972), *cert. denied*, 410 U.S. 968.

5 Respondent obtained counsel to appeal his deportation. Before the Board of Immigration Appeals, counsel urged reversal because he had filed a Rule 32(d) motion to attack respondent's prior plea to the narcotic charge. The attorney argued the conviction was not final and, therefore, respondent was not deportable. Because I believe respondent's request for appointed counsel should have been granted, I would not reach the Rule 32(d) motion as the majority does. I would reverse and allow a lawyer to decide how best to protect respondent's interests.

I do not intend to imply such a contention has validity. I cite this only to emphasize the danger of attempting to speculate at this stage whether counsel could have obtained a different result and to show that it is possible that the immigration judge did not fully consider all of petitioner's arguments.

Because the consequences of a deportation proceeding parallels punishment for crime, only a per se rule requiring appointment of counsel will assure a resident alien due process of law. In this case, the respondent, a resident alien for seven years, committed a criminal offense. Our laws require that he be punished and he was. Now, he must face additional punishment in the form of banishment. He will be deprived of the life, liberty, and pursuit of happiness he enjoyed by governmental consent.[6] It may be proper that he be compelled to fact the consequences of such a proceeding. But, when he does, he should have a lawyer at his side and one at government expense, if necessary. When the government consents to grant an alien residency, it cannot constitutionally expel unless and until it affords that alien due process. Our country's constitutional dedication to freedom is thwarted by a watered-down version of due process on a case-by-case basis.

I would reverse and remand for the appointment of counsel before the immigration judge.

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6 Of course, what I have said applies only to a resident alien. I readily agree that an alien who enters illegally is entitled to less due process, if any at all. It is interesting to note that the Immigration Act seems to treat all aliens alike.

APPENDIX C

No. 74-1565

United States Court of Appeals
For the Sixth Circuit

JESUS AGUILERA-ENRIQUEZ,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

ORDER

(Filed July 2, 1975)
John P. Hehman, Clerk

Before: Celebrezze and McCree, Circuit Judges, and DeMascio,* District Judge.

Petitioner's petition for rehearing having come on to be heard, and no judge of this Court having requested a vote on the suggestion that it be considered en banc.

IT IS ORDERED that the petition be, and it is, hereby denied.

ENTERED BY ORDER OF THE COURT
John P. Hehman, Clerk

By: Grace Keller
Grace Keller
Chief Deputy

*Honorable Robert E. DeMascio, U.S. District Judge for the Eastern District of Michigan, sitting by designation.

APPENDIX D

1. United States Constitution, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

2. 8 U.S.C. §1252(b)(2):

. . . Such regulations shall include requirements that —

(2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose; . . .

3. 8 U.S.C. §1362:

In any exclusion or deportation proceedings before a special inquiry officer and in any appeal proceedings before the Attorney General from any such exclusion or deportation proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose.